IN THE

Supreme Court of the United States

October Term, 1942.

No. 582.

WATERMAN STEAMSHIP CORPORATION,
Petitioner,

v.

DAVID E. JONES,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF ON BEHALF OF RESPONDENT ON WRIT OF CERTIORARI.

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BRIEF FOR RESPONDENT.

STATEMENT OF THE CASE.

This is an action by a seaman, the respondent here, to recover the cost of maintenance and cure. Respondent signed on under coastwise articles in New Orleans, La., for a voyage to East Coast and Gulf ports of the United States, for a period of twelve months (R. 2). The vessel called at the port of Philadelphia in the course of the voyage and on January 16, 1941, while it was moored to Pier C, Port Richmond, Philadelphia, respondent obtained shore leave. He descended from the vessel to the dock and was proceeding through the pier toward the street when all of the lights on the pier were extinguished and in the ensuing darkness he fell into a railroad siding and sustained certain injuries, as a result of which he was compelled to seek treatment ashore. He was unable to rejoin the vessel and complete the voyage (R. 2, 3).

This suit was thereafter brought to recover the cost of respondent's maintenance and cure and wages. Petitioner thereupon moved to dismiss the action upon the ground that at the time of the injury respondent was on shore and not in the service of the ship. The District Judge granted the motion to dismiss. On appeal to the United States Circuit Court of Appeals that judgment was reversed. Your Honorable Court granted the petition for certiorari to review the latter judgment.

COUNTER STATEMENT OF QUESTIONS INVOLVED.

Petitioner assumes in its questions presented that respondent was not in the service of the ship at the time of the accident and omits to say that respondent had of necessity to pass over the pier in going to or leaving the vessel. We think the following counter statement of questions covers the issues.

Where a seaman in the course of a voyage obtains shore leave and in passing through the pier, through which he had to go to get to the public highway, sustains an injury through no misconduct on his part, is he entitled to maintenance and cure even though his employer had no control over the pier?

SUMMARY OF ARGUMENT.

Respondent's contentions may be briefly summarized as follows:

FIRST: When a seaman enters into a contract of shipment he surrenders his personal liberty and is subject to the call of duty throughout the entire period of his employment.

SECOND: A seaman is in the "service of the ship", as long as he is subject to the call of duty, and this is so whether he be on shore or on the vessel or whether he be engaged in the actual performance of ship's business or in his own personal matters.

THIRD: Where a seaman falls ill or is injured while "in the service of the ship", he is entitled to maintenance and cure, unless the said illness or injury is due to his own vices or wilful misconduct.

FOURTH: The seaman's vices or wilful misconduct do not remove him from the "service of the ship", since he is still subject to duty, but they constitute a defense to the claim for maintenance and cure notwithstanding that he is in the "service of the ship".

FIFTH: Respondent was subject to the call of duty even while on shore leave, and since he was injured through no misconduct on his part while passing over the pier from his ship to shore, he was injured in the service of the ship and entitled to maintenance and cure.

SIXTH: The injury need not arise from a cause incidental to or connected with the seaman's employment to give rise to the right of maintenance and cure; however even if this were not the prevailing rule respondent would still be entitled to recover because he had to pass over the pier by necessity and any injury so occasioned would be incidental to his employment.

ARGUMENT.

It is conceded by all parties that the right to maintenance and cure arises from the seaman's relationship to the vessel, that is, from his "service in the ship". It is essential therefore to first consider the time during which and the circumstances under which a seaman is in the service of the ship without regard to the right of maintenance and cure.

When a Seaman Enters Into a Contract of Shipment, He Surrenders His Personal Liberty and Is Subject to the Call of Duty Throughout the Entire Period of His Employment.

A seaman is in the service of the ship if he is subject to the call of duty and earning wages as such. *"The Bouker, No. 2"*, 241 F. 831. Unlike any other contract for personal services, the seaman's contract of employment deprives him of his personal liberty during the entire period. He cannot abrogate his agreement and any attempt on his part to do so may result in fines, forfeitures and imprisonment (unheard of in shore employment). His authority to go ashore on leave is only a permissive one which may be granted or denied at the Master's pleasure. The Master may limit the shore leave as to time, place or in any other manner at his discretion or he may revoke the shore leave, once granted, and recall the crew at any time. The seamen are bound to obey whatever commands the master issues whether they may be on shore or aboard. It would present a sad state of affairs if the crew, while on shore leave, were not bound to obey orders. It is conceivable that an emergency may arise aboard ship which might require the presence of all hands, or circumstances might

compel the ship to sail sooner than expected. Were the crew not subject to the call of duty at all times they could refuse to return. The evil of such a rule is especially manifest in a distant or foreign port.

The relationship of Master to seamen was carefully considered by this Court in an opinion by Mr. Justice Byrnes in the case of *Southern Steamship Co. v. National Labor Relations Board*, 316 U. S. 31, 86 L. Ed. 1246. In that case a group of seamen congregated on the after deck of the ship while it was in a domestic port and refused to obey orders in an effort to compel the shipowner to bargain with their union. This court held that such conduct amounted to mutiny even though the ship was in a safe port. In discussing the relationship this Court said (p. 38):

> "Ever since men have gone to sea, the relationship of master to seaman has been entirely different from that of employer to employee on land. The lives of passengers and crew as well as the safety of ship and cargo are entrusted to the master's care. Every one and every thing depend on him. He must command and the crew must obey."

Moreover, your Honors noted that the "shipping articles" prescribed by Congress require the seaman to obey orders on shore as well as aboard (p. 38, 39):

> "But is is worth noting here that the form of the 'shipping articles' which the master and every member of the crew must sign prior to the voyage has been carefully prescribed by Congress, and that these articles contain this promise: 'And the said crew agree . . . to be obedient to the lawful commands of the said master . . . and their superior officers in everything relating to the vessel, and the stores and cargo thereof, whether on board, in boats, *or on shore* . . .' 46 USCA § 564, 713". (Italics ours.)

The contention was raised that the seaman's obligation was diminished when the ship was in a safe port. Your Honorable Court replied to this that the obligations do not vary with each change of circumstance (p. 43):

> "If further proof be needed of a Congressional belief that the requirements of discipline during a voyage do not vary with each change in circumstance, it may be found in the shipping articles to which we have already referred. For in those articles the members of the crew are obliged to promise to obey lawful commands 'whether on board, in boats, or on shore.'"

Finally, in recognizing the necessity for obedience throughout the voyage it was held (p. 45-46):

> "In any event, a sweeping requirement of obedience throughout the course of a voyage is certainly not without basis in reason. The strategy of discipline is not simple. The maintenance of authority hinges upon a delicate complex of human factors, and Congress may very sensibly have concluded that a master whose orders are subject to the crew's veto in port cannot enforce them at sea. Moreover, it is by no means clear that a ship moored to a dock is 'safe' if the crew refuses to tend it, as the strikers did at Houston. At the very least, steam must be maintained to provide light and fire protection. The damage to the Normandie is grim enough proof that the hazard of fire is ever present."

The learned counsel for the petitioner here was also the successful counsel for the steamship company, the petitioner in that case. Our learned friend in summing up the seaman's status in that case said on page 12 of his brief:

> "When a man puts foot on the deck of a ship, he becomes part of a disciplined organization subject to

> the navigation laws of the United States. He should know that during the term of that voyage he will be required to give up his freedom both while the vessel is at sea and while at any port of call and that during that time he will be subject to all orders of the master."

It is evident as the above quotation expressly shows that the shipowner fully recognizes the status of the seaman as being in the ship's service throughout the employment, and will claim the benefit of this status where it suits his interests. It would be contrary to every sound legal principle to allow the shipowner the benefits of that status without imposing upon him the liabilities flowing from that relationship.

When the seaman enters into the contract of shipment he gives up not only his personal liberty but also all bargaining rights for the duration of the voyage. *Rees v. United States*, 95 F. (2d) 784.

Another unique feature of the seaman's contract is illustrated in the case of *Robertson v. Baldwin*, 165 U. S. 275, 41 L. Ed. 715. There, a number of seamen refused to return to the vessel and the master thereupon caused the U. S. Marshal to arrest and detain them and return them aboard when the ship was ready to sail. The seamen alleged they were unlawfully restrained in violation of the 13th amendment, prohibiting involuntary servitude. This Court held that seamen were an exception to the rule and that the 13th amendment was not intended to cover them. Said the Court (p. 282-283):

> "From the earliest historical period the contract of the sailor has been treated as an exceptional one and involving, to a certain extent, the surrender of his personal liberty during the life of the contract. Indeed, the business of navigation could scarcely be carried on

without some guaranty, beyond the ordinary civil remedies upon contract, that the sailor will not desert the ship at a critical moment, or leave her at some place where seamen are impossible to be obtained—as Molloy forcibly expresses it, 'to rot in her neglected brine.' Such desertion might involve a long delay of the vessel while the master is seeking another crew, an abandonment of the voyage, and, in some cases, the safety of the ship itself. Hence, the laws of nearly all maritime nations have made provision for securing the personal attendance of the crew on board, and for their criminal punishment for desertion, or absence without leave during the life of the shipping articles."

(P. 287-288)

"In the face of this legislation upon the subject of desertion and absence without leave, which was in force in this country for more than sixty years before the 13th Amendment was adopted, and similar legislation abroad from time immemorial, it cannot be open to doubt that the provision against involuntary servitude was never intended to apply to their contracts."

By virtue of the seaman's contract he is in the service of the ship during the entire voyage and he cannot withdraw without exposing himself to the penalties provided by law.

The term of the voyage covers the entire period of employment, as was stated in *Reed v. Canfield*, 20 Fed. Cases, p. 426, No. 11641, at p. 428:

"The voyage of the ship must, so far as the seamen are concerned, be deemed to commence, when they are to perform service on board, and to terminate, when they are discharged from further service."

Nor does a seaman, to be in the "service of the ship", have to be engaged in ships business. In *Ringgold v. Crocker*, 20 Fed. Cas. p. 813, No. 11843, it was held at page 814:

"The service of the ship is by no means limited to acts done for the benefit of the ship, or in the actual performance of seaman's duty on board."

In *"The Bouker No. 2"* (supra), at page 833:

". . . it is enough that he was . . . subject to the call of duty as a seaman and earning wages as such. . . ."

The learned District Judge, in the case at bar, in dismissing the complaint admitted that the seaman is theoretically in the service of the ship even while ashore on his own pleasures, but he went on to say, only upon the ship is this theoretical subjection to call of duty a practical matter (R. 6). Then, realizing the implications which might result from this statement, qualified it by saying (R. 6):

"Of course this is not to be taken as holding that the mere fact that the sailor is physically on shore always puts him outside the service of the ship. There may be circumstances where, *even on shore leave* he is still within the reach of the call of duty, and in such cases it might well be that he is in the service of the ship." (Italics ours.)

In other words if the master or other officers also went ashore and came into contact with a seaman, that seaman was automatically in the service of the ship, but as soon as he went beyond the reach of the master's voice or control he was no longer in the ship's service. We have been unable to find any support for such a conclusion and we submit that it is both unsound and illogical. To carry the finding of the district judge to a logical conclusion it would have to be admitted that if the seaman was in fact not in the service of the ship when he obtained shore leave, he could break his shipping contract merely by absenting him-

self from the vessel. This is of course contrary to every established principle of the maritime law. The test is not whether he can be reached at a particular moment, but whether he is subject to the call of duty, and this statement implies primarily a theoretical subjection to the call of duty. From the practical standpoint a sailor might well make himself scarce and difficult to find even on board the ship. We suggest that if the seaman while on shore leave is in the service of the ship for any purpose, he is in it for every purpose. He cannot shed himself of the obligations arising from that term while on shore leave. If the master instructs him to limit his shore leave to certain territorial limits where he can be reached, it is his duty to obey. If while on shore his leave is revoked or he is otherwise commanded, he has no alternative but to obey. He must obey because his status, as this court stated in *Southern S. S. Co. v. N. L. R. B.* (supra) does not vary with every change in circumstances. By the same token, he is entitled to all the benefits flowing from that status. It would indeed be anomalous to say that he is in the service of the ship with respect to the obligations implied from that term but not with respect to the benefits which may accrue from it.

In the case at bar respondent went ashore with the consent of the master. He was subject to orders and was earning wages while on shore as well as on board ship. His physical departure from the vessel did not alter his relationship to the ship. He was still attached to the vessel as a member of the crew. These are the true criteria which determine whether a seaman is in the service of the ship.

It is now appropriate, having shown respondent to be in the service of the ship even while ashore, to consider the circumstances which give rise to the right of maintenance and cure.

Seamen Are Entitled to Maintenance and Cure for Any Illness or Injury Occurring During the Period of Their Employment.

The seaman's occupation has no real counterpart among shore employees. He travels through every climate, he is exposed to many diseases, as well as extreme heat and bitter cold in different parts of the world. He must experience the fury of storms and heavy seas which the shore worker would find more than merely uncomfortable to say the least. These are but part of the dangers, in addition to the ship's own hazards which are incidental to his employment. In the light of this background the right to maintenance and cure sprang up to safeguard the health of these men. The subject was carefully considered by Justice Story in *Harden v. Gordon*, 11 Fed. Case, p. 480, No. 6047, as follows at page 483:

> "Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour. They are generally poor and friendless, and acquire habits of gross indulgence, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease, and poverty, and sometimes perish from the want of suitable nourishment. Their common earnings in many instances are wholly inadequate to provide for the expenses of sickness; and if liable to be so applied, the great motives for good behaviour might be ordinarily taken away by pledging their future as well as past wages for the redemption of the debt. In many voyages, particularly those to the West Indies, the whole wages are often insufficient to meet the expenses occasioned by the perilous diseases of those insalubrious climates. On the other hand, if

these expenses are a charge upon the ship, the interest of the owner will be immediately connected with that of the seamen. The master will watch over their health with vigilance and fidelity. He will take the best methods, as well to prevent diseases, as to ensure a speedy recovery from them. He will never be tempted to abandon the sick to their forlorn fate."

The nature of the duty to provide maintenance and cure is itself evidence of the fact that it follows the seaman on shore as well as on shipboard, so long as his employment continues. As this court pointed out in *Cortes v. Baltimore Insular Line*, 287 U. S. 367, 77 L. Ed. 368 the duty is inseparably annexed to the employment without heed to the will of the contracting parties. In defining the duty the court said (p. 371):

"The duty to make such provision is imposed by the law itself as one annexed to the employment. The Osceola, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, supra. Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation, no agreement is competent to abrogate the incident."

Moreover, said the court, the duty is (p. 372):

". . . annexed as an inseparable incident without heed to any expression of the will of the contracting parties."

In considering the continuity of the liability for maintenance and cure the court said (p. 374):

"Here performance was begun when the vessel started on her voyage with Santiago aboard and with care and cure cut off from him unless furnished by officers or crew. *From that time forth withdrawal was impossible and abandonment a tort.*" (Italics ours.)

In the very latest expression of opinion by this court it is settled beyond controversy that the right to maintenance and cure applies as well to illness or injury suffered on shore as on board ship. In *O'Donnell v. Great Lakes Dredge & Dock Co.*, — U. S. — 87 L. Ed. 456, this court had to determine whether the Jones Act which gives seamen a right to damages for negligence, applied to injuries sustained on shore. This court ruled that it did so apply and in so holding drew an analogy to the right to maintenance and cure. The opinion by Mr. Chief Justice Stone shows (L. Ed. p. 460):

> "As we have said, the maritime law as recognized in the federal courts, has not in general allowed recovery for personal injuries occurring on land. But there is an important exception to this generalization in the case of maintenance and cure. From its dawn, the maritime law has recognized the seaman's right to maintenance and cure for injuries suffered in the course of his service to his vessel, *whether occurring on sea or on land.*" (Italics ours.)

Further, Your Honors stated that the right does not spring, strictly speaking, from tort or contract, but is an incident to the employment (L. Ed. p. 460):

> "But the seaman's right was firmly established in the maritime law long before recognition of the distinction between tort and contract. *In its origin, maintenance and cure must be taken as an incident to the status of the seaman in the employment of his ship.*" (Italics ours.)

In this connection a distinction might be made between the right to damages or indemnity and the right to maintenance and cure. In the former, there must be fault or

culpability on the part of the vessel or her tackle or crew. *In the latter the seaman's employment need not be the cause of the injury or illness. Calmar Steamship Corporation v. Taylor*, 303 U. S. 527, 82 L. Ed. 993. In that case, the court by Mr. Chief Justice Stone said (p. 527):

> "The duty which arises from the contract of employment . . . does not rest upon negligence or culpability on the part of the owner or master . . ., *nor is it restricted to those cases where the seaman's employment is the cause of the injury or illness.*" (Italics ours.)

Petitioner argues that it should not be charged with the expenses of maintenance and cure because the accident happened on the pier, over which petitioner had no control. This contention is specifically denied by the foregoing quotation.

In *Loverich v. Warner Co.*, 118 F. 2d 690, cert. den. 313 U. S. 577, 85 L. Ed. 1535, there was involved a malignant disease which manifested itself during the seaman's employment. Said the court (p. 692):

> "If Loverich acquired this malignancy in the throat *while employed* as a seaman for the respondent then the duty of maintenance and cure arises even though it was not caused by anything incidental to his work." (Italics ours.)

A clear illustration of the rule may be found in *Reed v. Canfield*, (supra). There, a number of the crew, including some of the officers, went ashore on leave, as did the respondent in the case at bar. After reaching the shore the officers instructed the men to return within a half hour and then they all dispersed. The men returned to the dock about two hours later and then began to row back to the

ship. They were intercepted by a storm before they could reach the vessel and were carried out into the harbor where one of the men became afflicted from exposure. It was there contended that the men were not in the service of the ship. Justice Story held concerning the maritime law (pp. 427-428):

> "It embraces all sickness, and all injuries, sustained in the service of the ship, and while the party constitutes one of her crew, without in the slightest manner alluding to any difference between their occurring in a home port or in a foreign port, upon the ocean, or upon the tidewaters."

Then on page 428:

> "The voyage of the ship must, so far as the seamen are concerned, be deemed to commence when they are to perform service on board, and to terminate, when they are discharged from further service. The title to be cured at the expense of the ship is coextensive with the service in the ship."

The court accordingly held that the seaman was in the service of the ship and awarded maintenance and cure.

Petitioner tries to argue away the effect of this case by stating that the seamen while returning to the vessel were actually engaged in carrying out orders of the officers and therefore were in the service of the ship. (Pet. brief p. 14.) This contention illustrates the fallacy in petitioner's entire argument. To begin with, all these men including the officers were engaged in a social expedition. If in fact a member of the crew was not in the service of the ship while away from the vessel, it must necessarily follow that he was not subject to orders and the officers would have no authority when outside the service of the vessel to issue orders.

By admitting that the men were in the service of the ship because they were carrying out orders issued to them on shore, and away from the vessel, is to assume that the officers had the authority to issue such orders. This authority could only flow from the fact that the officers were in the service of the ship even though themselves on shore leave and the men had to be in the service if obedience was required. Therefore by admitting the fact for one circumstance is to compel the conclusion that they were in the service for every circumstance. As has heretofore been shown, the seaman's status does not vary with every change of circumstance. We suggest that petitioner's explanation of this case supports respondent's contention rather than its own. The rule was clearly set forth in *The Bouker No. 2* (supra) (p. 833):

> ". . . a seaman 'falls sick, or is wounded, in the service of the ship,' if such misfortune attacks him while he is attached to the ship as part of her crew. It is not necessary that the wound or illness should be directly caused by some proven act of labor; it is enough that he was, when incapacitated, subject to the call of duty as a seaman, and earning wages as such."

A comparison between the stevedore and seaman further illustrates respondent's position as is set forth in *Benedict on Admiralty*, 6th Ed. Vol. 1, p. 61:

> "The stevedore's contract of employment does not contemplate any dominant Federal rule concerning the master's liability for personal injuries received on land. On the other hand a seaman's contract contemplates the application of the general maritime law and that law confers the right to maintenance and cure in case of illness or injury incurred irrespective of negligence, while he is in the ship's service whether such illness or

injury originate on land or upon navigable waters; the seaman's admiralty rights to maintenance and cure have a scope as broad as his employment."

Further discussion on this phase would only be laboring the point. We submit that the following principles may be fairly drawn from the decided and settled authorities:

(1) A seaman is subject to the call of duty on shore as well as on board ship during the entire voyage or period of his employment.

(2) The seaman is in the service of the ship on shore and on board ship during the entire period of his employment.

(3) A seaman who falls sick or is injured while in the service of the ship is entitled to maintenance and cure.

(4) A seaman who is injured on shore during his employment is injured in the service of the ship.

(5) To be entitled to maintenance and cure, a seaman who falls ill or is injured need not show that the illness or injury was caused by some act of labor.

(6) The right to maintenance and cure is not restricted to those cases where the seaman's employment is the cause of the illness or injury.

The application of these principles to the facts in the case at bar clearly shows that respondent was injured while in the service of the ship. However, before determining whether he is entitled to maintenance and cure we must consider certain exceptions to the rule which constitute a defense to the claim notwithstanding that at the time of the injury or illness the seaman was in the service of the ship.

The Defenses to the Right to Maintenance and Cure.

The general rule since time immemorial as has been stated is that a seaman who falls sick or is injured while in the service of the ship is entitled to maintenance and cure. There is however a well recognized exception where the illness or injury is due to the seaman's own gross misconduct or vices. In the *"Alector"*, 263 Fed. 1007, the court, after setting forth the traditional right of the seaman, said (p. 1008):

> ". . . but the right to cure does not include liability for disease arising from their own vices or gross acts of indiscretion."

See also *The Bouker No. 2* (supra); *Reed v. Canfield* (supra); *Ringgold v. Crocker* (supra); *Chandler v. The Annie Buckman*, 5 Fed. Cas. 449, No. 2591a.

The rule was somewhat more amply expressed in defining the extent of the misconduct which will bar the claim, in *"The Quaker City,"* 1 F. Supp. 840. There, the late Judge Dickinson held mere fault on the part of the seaman was insufficient to bar the claim. Said the court (p. 842):

> "There must be in what he did a punitive element with a resultant forfeiture. The phrase in use is in consequence that 'gross misconduct' will forfeit the right to cure at the expense of the ship."

The vices alluded to have been held to refer to venereal diseases. *"The Alector"*, (supra); *Chandler v. The Annie Buckman*, (supra). Wilful misconduct has been held to include intoxication. *"The s/s Berwindglen,"* 88 F. 2d 125; but see *"The Quaker City"*, (supra), where the court in holding the opposite said (p. 843):

> "When the right to cure for hurt and disease became part of the law maritime, 'drunken sailors' were not unknown, whatever the fact may be today, and our finding is that mere drunkenness does not forfeit the right."

It is clear that there must be a wilful act of gross misconduct or vice on the part of the seaman before his claim to maintenance and cure can be barred.

In the case at bar there was no misconduct or vice. The injury was caused by the extinguishment of the lights on the pier. Respondent's claim therefore falls squarely within the general rule and not within the exception.

Petitioner relies on several cases which are in direct conflict with the authorities herein advanced. A brief analysis however clearly discloses the unsound premise upon which those decisions are based.

All of the cases upon which petitioner relies are expressly based upon the decision of *Meyer v. Dollar Steamship Line*, 49 F. 2d 1002 (C. C. A. 9, 1931). This case attempts to introduce a new theory which is an unwarranted extension of the maritime law. In that case a seaman was injured while engaging in a friendly scuffle with a shipmate aboard the vessel. Instead of approaching the problem from the standpoint as to whether or not the friendly scuffle constituted an act of wilful misconduct, the court tried to solve the problem by advancing the theory that the scuffle interrupted his service on the ship. The fallacy of this approach is self evident since it completely overlooks the real test to determine whether a seaman is in the service of the ship, namely whether he is subject to the call of duty. The court reached the conclusion that the friendly scuffle was an intervening act on his part which interrupted

his service on the ship. However, the court went on to qualify the statement by holding that if, while fighting, he was injured by a falling timber or by lightning he was in the service of the ship and would be entitled to recover because it was not his intervening act which caused the injury. This seems to us to be a most illogical conclusion. If the man's service was interrupted by the scuffle then it should not make any difference how the injury occurred. It is apparent that what the Court really had in mind was to determine whether an intervening act on the part of the seaman which caused the injury, was a defense to the claim for maintenance and cure. It is perfectly clear that the seaman's conduct could not alter his relationship to the vessel. There could be no doubt that he was subject to the call of duty whether he was scuffling, sleeping or working. The court also fell into error by comparing the liability for seamen's injuries sustained in the "service of the ship", with the liability for soldier's injuries "in the line of duty", under the war risk insurance act. In the latter case the cause of the injury must be connected with the soldier's duties. In the former case it is beyond dispute that the injury need not be connected with the employment. The inconsistencies in the opinion of *Meyer v. Dollar Line* may be seen from a few excerpts from the opinion. The court recognized that (p. 1003):

> "A sailor cannot, like other workmen, divest himself of all his responsibilities to the company for which he works when his work for the day is done. For that reason, when the courts have been called upon to determine the bearing of the phrase 'in the service of the ship' they have given it a wide range."

It will be noted that the court did not however abide by the foregoing liberal principle for it restricted the term

to the prejudice of the seamen. Further, in considering the facts and suggesting a hypothetical situation the court said (p. 1003):

> "Appellant was off duty and was taking recreation; he was, as all sailors are, subject to call to duty in an emergency and was at the time 'in the service of the ship'. However, when he commenced his good-natured scuffling with his fellow shipmates the situation was changed. Appellant by his own volition created an extraneous circumstance; he brought about an intervening cause that directly affected his relation to his employers and to the ship."

The evil in this statement lies in the fact that it was not his relationship to his employer which was changed, because he was still subject to duty, but only that his claim was affected. Then the court drew an analogy between the seaman's right and the soldier's right to war risk insurance for injuries sustained in the line of duty (p. 1004):

> " 'To illustrate, a soldier in camp may, during a rest hour, be employing his time by working on an invention wholly disconnected with the military service. He is, in general, in the line of duty, but at the moment is exercising a private right for private purposes. An explosion is produced by chemicals which he is using. There has intervened a cause for which he is responsible and the injury is not suffered in the line of duty. But while so employed he is struck by lightning, or becomes ill, or is suddenly stricken with appendicitis, clearly there has been no intervening cause for which he is responsible and the injury is suffered in the line of duty.' "

The court then applied its theory of intervening act to the facts as follows (p. 1004):

"Even if he had been scuffling and the same weight had fallen on his leg, the injury might have been held as incurred 'in the service of the ship'. But the actual case was quite different, for here the injury flowed directly from an intervening cause for which the appellant alone was responsible. Consequently, the injury cannot be held to have been incurred 'in the service of the ship.'"

To begin with, the right to maintenance and cure is not similar to the soldier's right to war risk insurance. In the latter case the injury must be caused by the soldier's duties as the opinion expressly shows (p. 1004):

"In an opinion of the Attorney General concerning the phrase 'in line of duty' as interpreted under the provisions of the War Risk Insurance Act, 32 Ops. Atty. Gen. 12, 20, he said:

"'Was that cause appertaining to, dependent upon, or otherwise necessarily and essentially connected with, duty within the line, or was it unappurtenant, independent, and not of necessary and essential connection? That, in my judgment, is the true test-criterion of the class of * * * cases under consideration. * * *'"

It cannot be questioned that the above rule does not apply to the claim for maintenance and cure because this court has said that there need be no connection between the seaman's employment and the cause of the illness or injury. [*Calmar S. S. Co. v. Taylor*, (supra).]

It seems clear therefore that the court in the foregoing case improperly extended the defenses to the claim for maintenance and cure by adding injuries due to intervening acts to the rule which was restricted to gross acts of wilful misconduct.

The principle to be extracted from the *Meyer* case therefore resolves itself into the following proposition. If the seaman engages in a personal pursuit while off duty, and as a direct result of his own wilful act he is injured, then that act is to be considered as an intervening cause and precludes a recovery of maintenance and cure. If, on the other hand, while engaged in the same personal pursuit, he is injured by some other cause over which he had no control, then his own act was not an intervening cause in his service and he is entitled to recover.

Leaving aside the soundness of this theory for the moment, we submit that its application to the facts in the case at bar entitle the plaintiff to a recovery. The plaintiff was lawfully proceeding through the pier when the lights were extinguished through no fault of his. His injury was caused by the failure of the lights and not because of any act on his part. Even assuming the soundness of the foregoing principle, his claim cannot therefore be denied.

Whether or not we may agree with the result found in the *Meyer v. Dollar S. S. Lines* case, we cannot, however, subscribe to the reasoning upon which the conclusion was based. The very illustration given by the court, of the soldier injured by his own act on the one hand and by an independent act on the other, seems to us to clearly negative the conclusion reached with respect to his being in the service. The fact that he was engaged in the same personal pursuit in both instances makes it illogical to say he was in the service in one, and not in the other. It is undisputed that he was subject to the call of duty and earning wages in both instances. These facts alone place him in the service of the vessel. What the court apparently had in mind was to determine whether such an intervening act

constituted a defense to the claim for maintenance. On this latter basis, the court could have reached the same conclusion without indirectly attacking the problem through the seaman's service. Had the court applied the law as it previously existed, it could have denied recovery upon the ground that the injury was caused by the seaman's wilful misconduct. (Assuming that a friendly scuffle could be construed as an act of misconduct.) The question of service of the ship need not have been raised and need not have played any part in the decision.

We submit, however, that whether or not the reasoning in that case be sound, the facts in the case at bar justify a complete recovery under either interpretation.

Although the *Meyer* case is the foundation for the other cases cited by petitioner it is to be noted that petitioner only mentions it in the briefest of terms without discussing the theory of intervening cause advanced by that case. We suggest that petitioner felt compelled to avoid the basis of that decision because it would have had to admit as we have stated, that the basis for the decision is unsound and without authority, and moreover that even if it were sound it would not have precluded a recovery in the case at bar.

We proceed now with the remaining cases upon which petitioner relies.

In *Collins v. Dollar S. S. Lines*, 23 F. Supp. 395, the seaman went ashore on leave in Singapore and while engaged in a game of baseball was injured. The court held he was injured by a cause which was not connected with his employment and he was therefore not "in the service of the ship". The District Judge then set forth the rule laid down in *Meyer v. Dollar Lines* (supra), as applied to claims by soldiers for war risk insurance, and dismissed

the suit. We submit that if the rule in the *Meyer* case were the law then the decision was correct because the seaman's intervening act caused his injury. However this case likewise illustrates the fallacy of its own reasoning in holding that such an act took him out of the service of the ship instead of determining whether the act was a defense to the claim notwithstanding his being in the service of the ship. Moreover the conclusion reached by the court on the theory that the cause of the injury was not connected with the employment, is likewise clear error as we have shown.

Petitioner next relies upon and quotes at length from *"The President Coolidge"*, 23 F. Supp. 575. This case not only completely ignores the general maritime law but entirely misinterprets the *Meyer* case, upon which it expressly relies. There, a seaman was called from the ship to answer a phone call from his wife on the dock. While ascending the ladder from the ship to the dock he lost his balance and was injured. As will be observed from the excerpt of the court's opinion found in petitioner's brief p. 9, the court expressly relies on *Meyer v. Dollar Line* (supra). The court in dismissing the claim holds, and petitioner emphasizes by italics, that (p. 576):

> *"To entitle libellant to recover he must show that he received his injury while engaged in an act of labor in the discharge of the obligations of his employment."*

By italicizing this statement of the District Judge, petitioner would appear to intend extraordinary significance be given to it. We are reluctant to believe that petitioner has any faith in the accuracy of that statement. It is diametrically opposed to every authority emanating from this court. We have already set forth those authorities and will not therefore repeat them here. Moreover there

is nothing in the *Meyer* case upon which the court expressly relied, to justify such a finding. It must also be noted that a ladder from ship to shore is construed to be an extension of the ship and not the shore. *"The Admiral Peoples"*, 295 U. S. 649, 79 L. Ed. 1633. It would serve no useful purpose to argue further such manifest error.

Petitioner then cites *Smith v. American South African Line, Inc.*, 37 F. Supp. 262. There, a seaman went ashore on leave, and in the course of returning to the ship, when about two miles from the place where the ship was moored, was struck by a motorcycle and injured. In denying the right to maintenance and cure and wages, the court said (p. 263):

> "The matter needs no discussion, the point upon which plaintiff insists having been ruled to the contrary, in the following cases: Collins v. Dollar Steamship Lines, 23 F. Supp. 395; The President Coolidge, 23 F. Supp. 575; Meyer v. Dollar Steamship Lines, 49 F. (2d) 1002."

We submit that the matter needed considerable discussion because neither the *Meyer* case nor the *Collins* case fitted those facts and *"The President Coolidge"* (supra) was so clearly erroneous as to be entitled to no weight whatsoever. The *Meyer* and *Collins* cases both presented facts where there was an intervening act on the seaman's part which caused the injury. Even assuming the soundness of those decisions—which we do not—their findings would not apply because there was no intervening act by the seaman in the *Smith* case.

The same holds true of *Lilly v. United States Lines*, 42 F. Supp. 214, where the seaman, returning from shore leave fell from the dock into the water while searching for

the gangway to the ship. The pier and ship were both blacked out on account of war time conditions. The court denied maintenance and cure without discussion, relying on the *Smith* case just discussed.

The case of *Wahlgren v. Standard Oil Co. of N. J.*, 1941 A. M. C. 1788 (D. C. N. Y.) involved a seaman injured about a quarter of a mile from the pier while going on shore leave. Without discussion the court concludes he was not in the service of the ship, relying upon the *Collins* case, the *President Coolidge* and the *Smith* case just referred to. The arguments we have advanced as to them apply equally to this case.

Next cited by petitioner is *Todahl v. Sudden & Christenson*, 5 F. (2d) 462. This case does not involve any of the causes at issue in the case at bar. The seaman who was injured on the dock sued to recover damages under the Jones Act. The suit was dismissed because the court held that the Jones Act did not apply to injuries on land. Whatever comfort the petitioner might have derived from this decision is now dissipated by the very recent decision of Your Honorable Court in *O'Donnell v. Great Lakes Dredge and Dock Co.* (supra) wherein this court held that the Jones Act is not restricted to injuries on board ship but applies equally well to injuries on shore.

Finally, in the case of *Angco et al. v. Standard Oil Co. of Cal.*, 66 F. (2d) 929, an officer of the vessel, after engaging in a round of golf ashore was returning to the ship by automobile and in the course of this trip he struck and killed certain pedestrians. The personal representatives sued the officer's employer on the ground of agency. The court held that the officer was on shore leave and not on ship's business and therefore there was no relationship of

agency. We submit that this holding is in no sense relevant to the issues in the case at bar.

We suggest, as we believe our analysis of petitioner's authorities shows, that none of those decisions properly interprets the maritime law either as to what is meant by "service of the ship", or the extent of the liability for maintenance and cure.

We submit that under the true admiralty rule the only defenses to the claim for maintenance are those involving gross misconduct and vice on the part of the seaman.

Proceeding Through the Ship's Dock in Leaving or Boarding the Vessel Is Incidental to the Seaman's Employment.

We feel that the facts in the case at bar should be decided on the basis of the general admiralty principles heretofore under discussion. However, there is another feature attached to this type of case which cannot be overlooked. We refer to the fact that the accident occurred on the pier before respondent reached the public highway.

It has already been stated that the causes of the illness or injury need not be incidental to or connected with the employment. *Calmar S. S. Corp. v. Taylor* (supra). Obviously therefore if the injury arose out of a cause incidental to the employment, the requirements of the right to maintenance and cure would be more than satisfied.

Entirely aside of the considerations which have heretofore been discussed, it is also our position that it is incidental to a seaman's employment to cross over the pier, dock or property at which the ship is moored in order to gain ingress to or egress from the vessel. His employment compels him to use that exclusive path and it must there-

fore be construed as a necessary incident to his employment.

Moreover, it cannot be expected that the seamen will board the ship only at the commencement of the voyage and will leave it only after their final discharge. The narrow confines of the ship present little means of diversion, which is a necessary incident to the normal life of any man. Everyone must realize therefore that the seamen should be given every reasonable opportunity for shore leave to break the monotony of the voyage. This is especially true in the case of long voyages to Africa or to the Orient when the seamen may not see land for many weeks. It is for the best interests of the master and the ship that the morale and spirit of the crew be kept high. The most effective means of accomplishing this is by reasonable shore leave. It is therefore not only to be expected, but it should be advocated that the crew go ashore at reasonable intervals.

In leaving or boarding the ship the seaman must pass over a dock or larger property at which the ship is moored. In this connection petitioner argues that there are piers covering many city blocks and considerable territory over which the ship has no dominion or control and therefore it should be excused from liability. (Pet. Brief p. 14.) This would be a forceful argument to a seaman's suit for damages under the Jones Act where there must be fault or culpability on the part of the ship or its owner. No such rule is applicable to the right of maintenance and cure which attaches without regard to fault. Petitioner's argument on this point is therefore wholly irrelevant.

It is of course true that many of the plants at which vessels dock such as oil refineries are not only extensive in territory, but are in themselves hazardous places to pass

through. The seaman must pass through these places every time he boards or leaves the vessel. In many instances the lengthy piers may be in darkness but the seaman must nevertheless pass through to get to his ship. He passes over this property not by choice but by necessity. Piers are a necessary incident to the ship's business and passing over them is likewise incidental. There is no other way to get to or from the ship.

The right to maintenance and cure is infinitely more liberal than the compensation laws applicable to shore workers. Yet the compensation laws do provide a remedy under similar circumstances and furnish some helpful analogy. On this point petitioner contends that under the compensation law of Pennsylvania a claimant is not entitled to recover if the injury was not sustained on the premises of the employer, citing *Maguire v. James Lees and Sons Co.*, 273 Pa. 85; and *Palko v. Taylor-McCoy Coal and Coke Co.*, 289 Pa. 401. Neither of these cases bears on the point here. In the former the accident occurred on the public highway and in the latter upon the premises of a third party over which the worker was proceeding of his own choice and not because he had to. In neither case was there involved the fact that the worker was proceeding over premises where he had to go because of his employment. It might be significant to note that in the latter case the court pointed out that at the time of the accident the worker was not earning wages, and indicated that the Act might cover injuries away from the premises if he were earning wages at the time. Significantly the seaman earns wages during the entire life of his shipping contract aboard as well as ashore, in addition to being subject to the call of duty at all times. However, the Pennsylvania rule with

respect to the necessary use of adjoining premises also compels the payment of compensation for injuries sustained thereon. In *Feeney v. N. Snellenburg & Co., et al.*, 103 Pa. Super. 284, the court said (p. 289):

> " . . . the private street abutting on the employee's entrance to the store building was so used by the defendant as to form part of the premises of its store operations and that plaintiff was within the protection of the Workmen's Compensation Act when she fell."

In other jurisdictions the rule is the same. In the case of *"Re Sunding"*, 105 N. E. 433, it was held that an employee's injury arose out of and in the course of her employment although received after she had left her employer's workroom and while going to luncheon on a stairway not under the control of her employer, nor of the subscriber for whom he was working but which was the sole means of access to the employer's workroom.

In *Judson Mfg. Co. v. Industrial Accident Commission*, 181 Cal. 300, it was held that an injury sustained by an employee while proceeding to the employer's plant by way of a path crossing the right of way of a railroad which was the sole means of ingress and egress for the employees, was one arising out of and in the course of the employment.

A similar remedy is accorded under the English Law. In *John Stewart & Son v. Longhurst* (Eng.), 249 Ann. Cas. 1917 D, a carpenter was employed in making repairs to a barge. After the completion of his day's work, he left the barge and in the darkness he missed his way while passing along the quay and fell into the lock and was drowned. It was held that in the contemplation of both parties he was to use the dock to get to the barge, and that the accident

arose out of and in the course of employment. Said the court:

> ". . . The present case belongs to a class of cases where the thing on which the workman is employed is lying in a dark or other open space to which he obtains access only for the purposes of his work. Actual ownership or control by the employer of the spot where the accident occurred is not essential. The workman comes there on his way to and from his work, and may be regarded as in the course of his employment while passing through the dock or other open space to and from the spot where his work actually lies. Such passage is within the contemplation of both parties to the contract, and is necessarily incidental to it."

In further connection with the work of shore employees, the following situations, while having nothing to do with the work of the employer, have been held to be incidental thereto, and compensable.

Putting on a coat after hours is incidental to employment, and injury in the course of which is compensable. *Hughes v. Olmstead & Tuddle Co.*, Mass. Work. Comp. Case, 1539. Injury in the course of cleaning shoes calls for the same principle, in *Re Campbell*, Ohio Ind. Comm. No. 71569. The visit to a fellow actress' room was a natural and unobjectionable incident of employment. *Bolles v. N. Y. Motion Picture Corp.*, 2 Cal. Ind. Comm. 477 (12 N. C. C. A. 665). A motorman was injured on the street while proceeding to his trolley to work. Walking on the street was held to be an incident of his employment and therefore compensable. *Ketron v. United Railroads of San Francisco*, 1 Cal. Ind. Comm. 528 (12 N. C. C. A. 669-70).

Accidents occurring during a suspension of work ashore, also provide some helpful analogy. In *Robinson v.*

Kahl Construction Co., Ill. Ind. Bd. April 9, 1914, 12 N. C. C. A. 244, in passing upon question whether the injury arose out of and in course of employment the Industrial Board found that during the time the work was suspended, applicant was in respondent's employ, and the mere fact that he stepped from his place of employment on the car on which he was working to the railroad track with other employees and sat down there did not suspend the relation of master and servant between applicant and respondent, and the injury arose out of and in the course of employment. The award was confirmed.

In *Queenan v. Travelers Insurance Co.*, 3 Mass. Workmen's Compensation Cases 525, a waitress in a hotel received her board and lodging and was subject to call there. While arising to go to church she fell out of the window. She was awarded compensation, the court holding that the injury was sustained in the course of her employment.

Recalling that in the case of *Collins v. Dollar S. S. Lines* (supra), the court applied the doctrine of intervening act to a seaman injured playing ball ashore, it is interesting to note that even in shore employment the courts permit recovery for injuries during lawful diversions. In *Conklin v. Kansas City Public Service Co.*, 41 S. W. (2d) 608, a shore employee was injured by a baseball while watching the ball game during his lunch period and was awarded compensation.

As we have stated, the right to maintenance and cure is infinitely more liberal than the right to shore compensation. In connection with the former the seaman is bound to his employment and subject to the call of duty even while ashore. His employment exposes him to diseases, hardships, and privations that few shore employees would

care to encounter. The seaman's neglect or refusal to comply with any order of a superior officer whether aboard or ashore subjects him to drastic penalties. As our learned friend stated in his brief in the case of *Southern S. S. Co. v. N. L. R. B.* (supra), the seaman surrenders his liberty during the life of the voyage. No such obligations or penalties have been, nor in fact could be imposed on shore employees. We think it must necessarily follow therefore that the seaman's rights would embrace all of the liberal interpretations accorded to shore employees which might be applicable.

Seamen pass over the property adjoining their ship not by choice but by necessity. Passage over this property is therefore incidental to the seaman's employment and, as we have stated, more than satisfies the requirements to give rise to the right of maintenance and cure. That right clearly arises from causes which need not be connected with or incidental to the employment.

CONCLUSION.

As a general proposition we think it is clear from the authorities that the seaman is in the service of the ship during the entire life of the shipping contract. He is subject to the call of duty and his wages go on, whether he be engaged in ship's business or personal pursuits. When he joins the vessel he promises to obey all orders, ashore or aboard. He cannot therefore be subject to the liabilities without receiving the benefits of this status. Any injury occurring during the life of his employment contract must necessarily be considered as in the service of the ship. In order to determine whether there be any defense to this right the proper test to be applied is that set forth under the general maritime law prior to the *Meyer v. Dollar Line*

case; namely, was the injury caused by the seaman's own vices or wilful misconduct. If we apply the principle of *Meyer v. Dollar Line*, the defenses are extended to include those injuries which are caused by the wilful intervening act of the seaman himself which is directly responsible for the injury. This extension would seem to be broad enough to cover lawful intervening acts as well as acts of misconduct. We think that the extension of the rule to cover lawful intervening acts was never intended by the maritime law and therefore should not be followed in this court. We take this position despite the fact that the principle of intervening act as unduly extended does not preclude a recovery in the case at bar, there being no intervening act on the part of respondent which caused or contributed to the accident.

It is now settled beyond dispute that a seaman can bring suit for any injury sustained ashore both for indemnity and maintenance and cure. As to the former, there must be fault or culpability on the part of the master before there can be liability. As to the latter neither of those elements is necessary and the right to maintenance and cure arises for any injury, even though the cause is not connected with or incidental to the employment, provided however the injury or illness was not due to the seaman's own vices or wilful misconduct.

We respectfully submit that the decision of the Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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